

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Not Restricted

S ECR 2019 0122

THE DIRECTOR OF PUBLIC PROSECUTIONS

v

CODEY HERRMANN

<u>JUDGE:</u>	HOLLINGWORTH J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	1, 2 and 3 October 2019
<u>DATE OF JUDGMENT:</u>	29 October 2019
<u>CASE MAY BE CITED AS:</u>	DPP v Herrmann
<u>MEDIUM NEUTRAL CITATION:</u>	[2019] VSC 694

CRIMINAL LAW – Sentence – Murder (1 charge) – Rape (1 charge) – Brutal attack on a stranger, late at night, on a public street – Savage and sustained assault on victim’s head with metal pipe, rendering immediately unconscious – Limited pre-planning – Attempt to destroy evidence by burning body – *Bugmy* considerations – Severe personality disorder – Applicability of *Verdins* principles – Early plea – Limited remorse – Young offender – No prior convictions – Prospects of rehabilitation – Standard sentencing offences – Total effective sentence of 36 years, with non-parole period of 30 years.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the DPP	Mr P Bourke	Solicitor for Public Prosecutions
For Mr Herrmann	Mr T Marsh Ms A Wong	Victorian Aboriginal Legal Service

HER HONOUR:

- 1 Aii Maasarwe was only 21, when you brutally attacked her in the early hours of the morning of Wednesday, 16 January 2019. Earlier that evening, she had gone to a 'Let's Talk in English' social event in the city, and then to a comedy show in North Melbourne. One of her friends dropped her off at Bourke Street, to catch the tram home to her student accommodation. At 12:05am, she got off the No 86 tram on Plenty Road. She crossed the road, and began walking east along the footpath of Main Drive, Bundoora, next to the Polaris Shopping Centre.
- 2 You had spent much of that evening hanging about in or around the shopping centre. At 12:07am, you left the shopping centre, through the carpark, onto Main Drive. Shortly thereafter, you saw Ms Maasarwe walking towards you. The distance from the tram stop to where you attacked Ms Maasarwe was only about 100 metres.
- 3 As she was walking along, Ms Maasarwe phoned her sister, Ruba, who lived in Israel. It was something she often did, as it made her feel safer walking home alone at night. All Ms Maasarwe was able to say to Ruba before you attacked her was "I didn't expect you to pick up." Ruba then heard her sister screaming and swearing at you in Arabic, followed by the sound of someone or something being hit four times.
- 4 After you confronted Ms Maasarwe on the footpath, and struck her over the head with a metal pipe, she dropped her phone and fell to the ground, unconscious. She never regained consciousness.
- 5 Having incapacitated Ms Maasarwe, you dragged her body behind a low hedge, between the footpath and the carpark. You removed some of her clothing and raped her. You struck her at least nine more times to the head with the metal pipe, with severe force, causing multiple fractures to her skull and face, and lacerations to her brain. She died from her catastrophic head injuries. At some stage, her neck was also injured, but it is not possible to say whether that was caused by you trying to choke her, or in the process of you dragging her. The forensic evidence also does not establish the order in which you committed those various acts.

- 6 You then dragged her further behind the hedges, to the location where her body was ultimately found. You sprayed her with 'WD40' fluid from an aerosol can and, using a lighter, set fire to her clothing and body. You did this to try to destroy evidence that might have implicated you in the attack. Given the severity of the skull and brain injuries, it is highly unlikely that Ms Maasarwe survived for any significant period after their infliction. That is consistent with your account that she was dead when you performed these later actions.
- 7 You fled the scene, taking Ms Maasarwe's purse with you. By 12:27am, CCTV footage shows you climbing the fence of the nature reserve on the south side of Main Drive. The distinctive black cap you had been wearing was caught on the barbed wire at the top of the fence, so you abandoned it.
- 8 As you moved south through the reserve, you discarded your blood-stained T-shirt, the WD40 can and the metal pipe. You climbed the fence at the southern end of the reserve, crossed Plenty Road and entered Bundoora Park, where you discarded Ms Maasarwe's purse and its contents. You then fled the area.
- 9 Throughout that period, Ms Maasarwe's phone call to her sister, Ruba, remained connected. Ruba became concerned by what she had heard, and because Aiia had stopped responding to her. Over the next few hours, Ruba and her sister, Noor, who was living in China, made several unsuccessful attempts to contact Aiia by text message. Around 7:00am, Noor called Victoria Police, to alert them to what Ruba had heard, and to ask them to check on Aiia.
- 10 Shortly before that phone call was made, Ms Maasarwe's body had been found by a passer-by on her way to the tram stop.
- 11 You were identified as the offender from CCTV footage from the Polaris Shopping Centre, and from the trail of items which you had left behind as you fled the scene. You were arrested two days later, on the Friday morning. When interviewed by police, you denied having killed or raped anyone, and said you could not explain how your DNA and fingerprints came to be on so many crime scene items.

- 12 There are a number of matters that are relevant to assessing the objective gravity of this offending.
- 13 The murder and rape were completely random offences, committed against a total stranger, late at night. Ms Maasarwe was doing nothing more than walking along a public street, on her way home from a night out, as she had every right to do.
- 14 Whenever a woman is brutally attacked by a stranger in public, understandably it causes other women to feel less safe going about their ordinary daily lives.
- 15 Ms Maasarwe was physically small, unsuspecting and alone. Seeing you only moments before you first struck her, she had no opportunity to flee or defend herself.
- 16 You quickly subjected her to a savage attack, with a crude but effective weapon, which immediately rendered her unconscious. Once she was completely incapacitated, you dragged her off the footpath, to a position of relative cover, where you forcefully raped her. You struck her head repeatedly, using severe force, causing catastrophic injuries. You struck her with the clear intention of killing her, not merely injuring her.
- 17 You left the carpark at 12:07am, two minutes after Ms Maasarwe got off the tram. The CCTV footage from the shopping centre and the carpark does not show you carrying the metal pipe that evening, so you must have picked it up in the short period of time between leaving the carpark and attacking Ms Maasarwe. Given that time frame, the metal pipe must have been somewhere in the vicinity of the carpark exit or the hedges. However, there is simply no evidence as to who placed it there or when they did so, or when you first became aware of it. The nature of the weapon is consistent with it being an object that may have been discarded as rubbish by someone.¹ But there are a number of other possibilities as to how the pipe came to be in that area. That said, your counsel conceded that you were holding the pipe when you began to assault Ms Maasarwe; you did not simply come across it after the attack began.

¹ There was evidence of other items having been discarded in the area. For example, in the shrubbery where this offending occurred, police also found a large knife, which had nothing to do with this offending.

- 18 It is a significant aggravating feature of your offending that you tried to destroy evidence of your offending by setting Ms Maasarwe's clothing and body alight. Treating her body in this way showed utter contempt for her dignity.
- 19 As with the metal pipe, there is no evidence one way or the other as to when or where you got hold of the WD40 can. It is possible that you had it with you before you began the attack. But it is also possible that, after you finished the attack, you went and looked for some sort of flammable liquid in the vicinity of the shopping centre or nearby garbage bins; there would have been sufficient time for that to occur in the period between the attack and you fleeing the scene at 12:27am.
- 20 I have doubts about the accuracy of your claim that you do not recall where you got the pipe or the WD40 can from. The assault must have involved some element of premeditation, in so far as you began it with the pipe in your hand. However, the state of the evidence does not enable me to be satisfied beyond reasonable doubt that you had obtained and secreted both items at some earlier time, with the intention of using them in a later attack. That is to say, the prosecution cannot establish beyond reasonable doubt that the attack involved substantial pre-planning.
- 21 The disorganised manner in which you fled the scene, leaving a trail of incriminating items behind you, also suggests an unsophisticated, opportunistic attack, rather than a carefully-planned crime.
- 22 The attack was entirely unprovoked, driven by what one of the experts in this case described as the "angry type of sexual homicide."
- 23 For these reasons, the murder and rape are both very serious examples of offences which are themselves extremely serious.
- 24 Not only did you take away Ms Maasarwe's most precious right, her right to life, but you deprived her close-knit family of a beloved daughter and sister.
- 25 Aiiia Maasarwe was a young Palestinian woman, who began her education in Israel. After studying at a university in Shanghai, China, she came to Australia in August

2018 as an international student. Fluent in Arabic, Hebrew and Mandarin, she came here to improve her English at La Trobe University. She loved living here, and her family were looking forward to coming and visiting her in Australia.

- 26 Ms Maasarwe was a friendly, optimistic, kind, young woman, who had her whole adult life ahead of her. She was a loving and much-loved member of the Maasarwe family, and your actions have profoundly affected them all, particularly her parents, Saeed and Kittam, and her sisters, Noor, Ruba and Lena. In their victim impact statements, the family have spoken in very moving terms about the devastating effects of losing Aiiia. They are all suffering in different ways from her death. At times, they feel that they are stuck in a nightmare. Ms Maasarwe's death has left an enormous hole in their lives. Not only did you destroy her future, but you also ended her family's dreams of sharing their lives and growing old together.
- 27 Ms Maasarwe's family want people to remember the joy that she brought to other people's lives, not the way in which she died.
- 28 Ruba, in particular, feels she has let Aiiia down, by being unable to tell what was happening during the phone call. Hopefully, with the passage of time, Ruba will come to accept that, given the speed and ferocity of your attack, there was nothing she could have done that might have saved her sister.
- 29 The family have also suffered from the publication of some details of this offending, which they would have preferred to remain private; that came about in the following circumstances. At the start of the plea hearing, I lifted a Magistrates' Court suppression order, which prevented publication of any of the details of the offending other than that Ms Maasarwe had died as a result of blunt force trauma. I did so because there was simply no legal basis for allowing the suppression order to continue. Terrible as these events were, there was nothing about the offending in this case that would not ordinarily be reported in full in an Australian court. Nevertheless, being aware of some of the cultural sensitivities surrounding such matters in Arabic culture, and wishing to minimise the distress to Ms Maasarwe's family, I asked

counsel and the media not to disclose the more graphic details of the offending. However, unless the media were allowed to report the basic elements of the offending, there was a real danger that the public would be misled as to its true nature, and the reasons for any sentence that the court imposed.

30 Even though the media have, as far as I am aware, been very respectful in their reporting of this case, I acknowledge that the requirements of open justice in this country have, unfortunately, caused additional distress to family members.

31 There is nothing this court can say or do that will bring back Aiiia Maasarwe, or heal her loved ones' terrible grief and pain. The sentence I am going to impose is not a reflection of the worth or value of Ms Maasarwe's life – no sentence can ever reflect something which is beyond value. Rather, the sentence must reflect the large number of factors which judges are required by law to take into account, one of which is the content of the victim impact statements.

32 Why did you do these appalling things? Unfortunately, as your counsel frankly acknowledged, there is no simple explanation for your actions.

33 It is necessary to consider your background in some detail, to understand how you came to be the seriously damaged young man who committed these offences. Much of your life history has been extensively documented in more than 2,000 pages of welfare records, in your file kept by the Victorian Aboriginal Childcare Agency.

34 You were born in September 1998, to an aboriginal mother and a non-aboriginal father, both of whom were only 19 at the time. They already had a child, your older sister.

35 There is no doubt that the environment in which you lived for the first three years of your life was one of extreme physical and emotional deprivation.

36 By the time you were six months old, you had come to the attention of welfare authorities, due to your mother's alcohol problems and maternal violence. You were temporarily removed from your parents.

- 37 By your first birthday, your mother had abandoned you into the care of a relative whose own children had been removed by court order due to serious neglect. About six months later, you were again taken into care, and hospitalised with scabies.
- 38 Over the next 18 months, while living with one or both of your parents, you were the subject of numerous welfare notifications, due to chronic parental drug and alcohol problems, domestic violence, emotional abuse, and failure to meet your basic needs (including adequate food). The level of physical neglect was so profound that you and your sister had digestive problems, rotten teeth, and skin problems due to lack of cleanliness. You also had delayed developmental milestones.
- 39 When your mother took you to Perth in mid-2001, your father notified authorities that she was abusing alcohol and hitting the children. That led to you and your sister being removed from your mother, and placed in foster care with a woman who lived in Bundoora; it eventually became a permanent placement until you were 18.
- 40 After your father returned to Melbourne with his new partner, he did not wish to see his children at all. He has played very little role in your life since you were about six, and you have very little memory of him.
- 41 Your mother also displayed little interest in having contact with you over subsequent years. She was supposed to have regular access visits, but often cancelled them, did not attend, or turned up intoxicated.
- 42 After beginning school in 2004, you soon displayed a range of behavioural problems. You were emotionally fragile, with anger and self-esteem issues. You had difficulty forming friendships, and negotiating social play situations. You were often rough or aggressive with other children, and had difficulty controlling your behaviour. You also had poor concentration in class.
- 43 Your mother died when you were 13. That coincided with a steady decline in your behaviour. Anger, cannabis and alcohol abuse, and truanting from school, began to emerge as problems. You began associating with boys who were a bad influence.

- 44 By late 2014, you had begun leaving your foster home and sleeping rough from time to time. After you went missing for about one month in April 2015, the police became involved. Although you returned to your foster home, tensions were evident, and the placement had broken down by the end of that year. However, you continued to go back to your foster home periodically after that.
- 45 Your first recorded involvement with mental health services was in November 2016, when you were admitted as an inpatient to Orygen Youth Health, because you were floridly psychotic. You were discharged a fortnight later, after starting to take an antipsychotic medication. During 2017, you had further contacts with mental health services, including a further hospital admission in July 2017. Paranoid thoughts were beginning to intrude into your daily life. You did not engage well with treating teams, and frequently ceased using psychiatric medication against advice.
- 46 These interactions with mental health services appear to have been precipitated by you experiencing drug-induced psychoses. Although you have tried a range of illegal substances since your early teens, methamphetamine ("ice") and cannabis have been the ones you have used most heavily in recent times.
- 47 Your functioning declined over the second half of 2017, with increased substance abuse and intrusive paranoid thoughts. You were living in transitional youth housing, and struggling at school. You dropped out of school during year 11.
- 48 In June 2018, you left the transitional accommodation, intending to return to your foster mother. However, the return was unsuccessful, as you were unable to stop using drugs. You moved out in September of that year, and became homeless.
- 49 You have only ever had brief periods of casual employment in unskilled jobs.
- 50 Your social contacts were limited to a small group of people, all of whom were also abusing substances. You were not particularly close to anybody. You broke up with your last girlfriend in the year before the offending.
- 51 About one month before this offending, you had attempted suicide.

- 52 In the days leading up to this offending, you had been squatting in an abandoned, condemned house in Greensborough. You were estranged from your foster mother and sister. Your sole source of income, your Centrelink benefit, was largely spent on drugs – mostly ice and cannabis. You fed yourself by shoplifting from supermarkets.
- 53 Although you were a regular drug user during this period, there is no suggestion or evidence that you committed these acts while you were intoxicated, or in a drug-induced psychosis.
- 54 For the purposes of sentencing, you were assessed by Associate Professor Andrew Carroll, a forensic psychiatrist, and Associate Professor Warwick Brewer, a consultant neuropsychologist. In addition to assessing you in person, both experts had the benefit of having access to your entire VACA welfare file and other mental health records. Their comprehensive reports were of considerable assistance to the court. In addition to his detailed report, which ran to more than 70 pages, Dr Carroll also gave oral evidence for the better part of a day.
- 55 As far as your cognitive functions are concerned, your IQ is within the average range, although you have some mild deficits in verbal comprehension and memory, and organisational ability. Notwithstanding your mother's longstanding problems with alcohol, you have not been diagnosed with foetal alcohol spectrum disorder.
- 56 Although some of your symptomology might form part of a diagnosis of schizophrenia, both experts agreed that your previous psychotic episodes were more likely to have been due to drug-induced psychoses than schizophrenia. They also agreed that a more appropriate diagnosis for your condition at the time of the offending and now is "severe personality disorder".
- 57 A personality disorder is diagnosed when a person displays enduring deficits in areas of thinking, feeling and behaviour, particularly in terms of impulse control and interpersonal behaviour. The availability of a detailed longitudinal history of your life, in the form of the VACA file, enabled Dr Carroll to trace the likely aetiology and development of your personality disorder from childhood into adolescence, and now

early adulthood. Particular deficits which you display include: chronic emotional disconnection; distorted assumptions regarding other people's attitudes and intentions; chronic hyperarousal and hypervigilance; and a sense of dissociation from the world.

58 At the time of the offending, you also had a diagnosable condition of substance abuse disorder. The substance abuse disorder is now in remission in custody.

59 Dr Carroll said that your personality and substance abuse disorders were both necessary, but not sufficient, elements in any explanation of your offending. He described your life in the six months or so before this offending as being marked by "profound chaos and despair". You were homeless, unemployed, and spending your time with drug-abusing peers. You were not engaged with mental health services, and had stopped using your antipsychotic medication in early 2018. In this context, bereft of any prosocial, external "scaffolding", and subject to the regular damaging effects of cannabis and ice, your already fragile higher order mental functions (the executive functioning capacity of the brain, responsible for self-control, coherent planning and organisation) began to break down entirely.

60 Dr Carroll could not point to any single, critical factor that precipitated the ultimate breakdown of inhibition on the night in question. He believes that a number of proximal factors are likely to have reinforced each other in compromising your already fragile executive functioning capacity, including: a number of humiliating or violent experiences involving your peers in the preceding weeks and months; the unresolved effects of a previous relationship breakdown; the ongoing effects of regular intoxication; worsening of your mood state, with depression of mood, hopelessness and some suicidal ideation; and the poor state of your physical health, including a degree of chronic starvation. Dr Carroll believes that your profound personality dysfunction, and your accumulated unprocessed anger towards the world (particularly women), led to your committing this angry type of sexual homicide.

- 61 Considerable time was spent during the plea hearing addressing what, if any, effect your history and the diagnosis of severe personality disorder should have on your sentence.
- 62 In a case called *Bugmy*,² the High Court acknowledged that the effects of profound childhood deprivation may compromise a person's capacity to control their impulses, and do not necessarily diminish with the passage of time.³ That may reduce the offender's moral culpability to some degree. The precise weight to be afforded to the effects of social deprivation in an offender's youth and background requires individual assessment in each case.⁴
- 63 You undoubtedly suffered from profound childhood deprivation and trauma. Dr Carroll described the first couple of years of life as being crucial in terms of human development. He said that due to the lack of secure, early attachment in the first three years of your life, the foundational building blocks of normal personal functioning were not established. Even though your foster mother subsequently provided some stability in your life, it is very difficult to try to overcome such profound early deficits, and you continued to experience abandonment issues and feelings of alienation. I accept Dr Carroll's evidence as to the effect that your childhood deprivation had on your capacity to process emotional distress and control your impulses; that reduces your moral culpability to some degree.
- 64 However, as the High Court also acknowledged in *Bugmy*, the inability of an offender to control their violent response to frustration may decrease moral culpability, but increase the importance of protecting the community.⁵ That is the case here.
- 65 In addition to the *Bugmy* principles, your counsel argued that well-established legal principles known as the *Verdins* principles also applied in your case, so as to further reduce the sentence that would otherwise be imposed.

² *Bugmy v R* (2013) 249 CLR 571.

³ *Bugmy*, French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ, [44].

⁴ *Bugmy*, Gageler J, [56].

⁵ *Bugmy*, French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ, [44].

66 In *Verdins*,⁶ the Court of Appeal said that an offender's impaired mental functioning may be relevant in sentencing, in one or more of six different ways, including the following:

- (a) The condition may reduce the offender's moral culpability, thereby affecting the punishment that is just in the circumstances, and the importance of denunciation as a sentencing consideration. The offender's moral culpability may be reduced if the impaired mental functioning had any of the following effects: impairing the offender's ability to exercise appropriate judgment, make calm and rational choices, think clearly, or appreciate the wrongfulness of the conduct; making the offender disinhibited; obscuring the intent to commit the offence; or contributing causally to the commission of the offence;⁷ and
- (b) General and/or specific deterrence may be moderated or eliminated as a sentencing consideration, depending on the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, at the time of offending and/or sentencing.⁸

67 There is no dispute that the *Verdins* principles are enlivened only where the offender suffers from "an impairment of mental functioning". However, there is a dispute as to whether the *Verdins* principles apply in the case of a severe personality disorder.

68 The court in *Verdins* did not limit the types of conditions to which the principles applied, and emphasised that the diagnostic label was not important; rather, the critical question was how the particular condition might have affected the mental function of the offender in the particular circumstances.

69 However, the prosecution argue that *Verdins* principles do not apply in respect of any personality disorders, because of the later Court of Appeal decision in *O'Neill*.⁹ Your counsel argue that some of the *Verdins* principles do apply to your particular

⁶ *R v Verdins; R v Buckley; R v Vo* (2007) 16 VR 269.

⁷ Often referred to as *Verdins* principle (1).

⁸ *Verdins* principles (3) and (4).

⁹ *DPP v O'Neill* (2015) 47 VR 395.

personality disorder, so as to reduce your sentence. Because there is a legal dispute as to the applicable legal principles, it is necessary for me to discuss the law in more detail than I would ordinarily do in sentencing remarks. It is also necessary for me to explain how mental health practitioners characterise different mental health conditions.

70 Severe personality disorder is a condition recognised in a publication called ICD-11 (which is the eleventh edition of the International Classification of Diseases, the World Health Organisation's official diagnostic manual), as well as in DSM-5 (which is the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders, the American Psychiatric Association's diagnostic manual). Both the ICD and the DSM are frequently relied upon in Australia as taxonomic and diagnostic tools. DSM-5 (unlike its predecessor, DSM-IV) puts forward two different models for considering personality disorders. The first is what might be called the standard approach, which divides personality disorders into categories. The second is an alternative model, which adopts a more nuanced dimensional approach, rather than a categorical approach. ICD-11 takes a similar dimensional approach. The dimensional approaches considers whether a personality disorder is mild, moderate, severe or extreme.

71 DSM-IV had adopted what was called a "multiaxial system", with clinical disorders such as schizophrenia or bipolar disorder being in the category called "Axis I", and personality disorders being in "Axis II". Dr Carroll explained that the multiaxial approach led people to assume, quite erroneously, that the impairment associated with Axis II conditions was somehow less than the impairment associated with Axis I conditions. According to Dr Carroll, the most impaired patients are frequently the ones with personality disorders at the severe end of the spectrum. This common misunderstanding was one of the reasons why DSM-5 moved to a non-axial model of diagnoses.

72 In *O'Neill*, the offender had been diagnosed as suffering at the time of the offending from "Dependent Personality Disorder with Prominent Features of Narcissistic Personality Disorder". Subsequent to the offending, he also developed an

“Adjustment Disorder with Depressed Mood.” Both of those disorders met the diagnostic criteria in DSM-5.

73 The Court of Appeal accepted that an offender’s personality – who he was – did have some relevance in assessing their level of criminality. Accordingly, Mr O’Neill’s complex personality matrix was not irrelevant to sentencing, and did help explain his conduct – but that was not on the basis that *Verdins* principles applied.¹⁰

74 After undertaking a detailed examination of the development of the *Verdins* principles, the Court of Appeal said that it was important to keep in mind that the principles related to offenders who suffered from “mental impairment” or “impaired mental functioning”, before observing that:

While the Court in *Verdins* regarded the particular diagnostic label as not being determinative, the principles expressed have always been confined to cases in which the offender suffered an impairment of his or her mental functioning. They do not apply to personality disorders such as those from which [Mr O’Neill] suffered.¹¹

75 Later in their reasons, the court said that *Verdins* principles do not extend to personality disorders “such as those relied upon and which are set out in Section II of DSM-V.”¹²

76 The Court of Appeal said that it was convenient to refer to a passage from the Queensland Court of Appeal decision of *Hayes*,¹³ a case in which a white collar offender had been diagnosed with a borderline personality disorder. In delivering the lead judgment in *Hayes*, Chesterman JA said that:

[P]ersonality disorders ... are not illnesses which impact on the capacity of the sufferer to perceive the world around her and respond to it. A personality disorder is a description of a personality type, or the traits which define the person and the person’s predominant modes of behaviour. The personality type becomes a disorder when the traits become manifest in behaviour which ‘deviates markedly from the expectations of the (person’s) culture’ and leads to ‘distress or impairment.’ The passages are from DSM IV.¹⁴

¹⁰ O’Neill, [91] and [96].

¹¹ O’Neill [71].

¹² O’Neill [85].

¹³ *R v Hayes* [2010] QCA 96.

¹⁴ *Hayes*, [28].

- 77 *Hayes* was a problematic authority to have referred to, for a number of reasons. The Queensland court had before it a psychiatric report which Chesterman JA described as “largely unhelpful,” and a self-represented offender. Given that limited assistance, it seems from his brief reasons that his Honour based his understanding of personality disorders from his own reading of DSM-IV.¹⁵ He relied on the version of the DSM which was no longer current at the time of *O’Neill*. He did not refer to any legal or scientific authority in support of his statement of broad principle - namely that personality disorders are not illnesses which impact on the capacity of the sufferer to perceive and respond to the world around them. Although Holmes JA¹⁶ agreed with the result on the evidence in *Hayes*, her Honour said she preferred not to express any more general conclusion on the topic of whether personality disorders could constitute mitigating circumstances.¹⁷
- 78 After mentioning *Hayes*, the Court of Appeal in *O’Neill* went on to consider in some detail the expert evidence concerning Mr O’Neill. The court concluded that his specific dependent personality disorder did not meet the threshold criteria for *Verdins*, because it did not establish that he was unable to appreciate the wrongfulness of his conduct, or exercise appropriate judgment, or make a rational choice; nor did it obscure his intent. In those circumstances, Mr O’Neill was not suffering from an impairment of mental functioning at the time of the offending.¹⁸ This was the underlying reason for the decision (in legal terminology, the *ratio decidendi*) in *O’Neill*.
- 79 The Court of Appeal did not refer to any appellate authority dealing with personality disorders, except for the brief reference to *Hayes*. Nor did they have the benefit of expert evidence about any personality disorders, apart from the specific ones with which Mr O’Neill had been diagnosed. The court did not purport to conduct a detailed consideration of all of the different types of personality disorders listed in DSM-5, or discuss the significant changes in approach between DSM-IV and DSM-5.

¹⁵ Ann Lyons J simply agreed with Chesterman JA’s reasons.

¹⁶ As the Chief Justice then was.

¹⁷ *Hayes*, [1], [2].

¹⁸ *O’Neill*, [85].

- 80 As Dr Carroll explained at some length in this case, some personality disorders may be capable of meeting the requirements of *Verdins*, while others may not.¹⁹ To draw a categorical distinction between personality disorders and other conditions would be to ignore the clinical evidence.
- 81 In those circumstances, the Court of Appeal's brief observations that *Verdins* principles did not apply to personality disorders "such as those relied upon in this case" should be understood only as referring to the particular personality disorders in that case, namely dependent personality disorder and adjustment disorder with depressed mood. That was the view adopted by Coghlan JA in the recent case of *Bruno*,²⁰ where his Honour held that *Verdins* principles did apply to moderate the sentence for an offender who suffered from severe schizoid personality disorder.²¹
- 82 Dr Carroll believes that your severe personality disorder led to you perceiving the world in "a profoundly abnormal way", and severely impaired your ability to exercise appropriate judgment, to think clearly, to make calm and rational choices. As far as causation is concerned, Dr Carroll also said that the offending "only made sense" by reference to your severe personality disorder. In those circumstances, *Verdins* principles operate to reduce, to some extent, your moral culpability, and the need for general and specific deterrence.
- 83 However, three further matters need to be noted in this regard.
- 84 First, as with the *Bugmy* principles, the matters that make *Verdins* principles applicable to you decrease your moral culpability, but increase the importance of community protection. That said, according to Dr Carroll, although some degree of personality dysfunction is likely to be enduring, the current degree of personality dysfunction is not necessarily permanent; the prognosis will depend on your access and response to treatment, and the effects of natural maturation on your central nervous system.

¹⁹ This is a topic which is helpfully discussed in more detail in the following article: "Sentencing offenders with personality disorders: A critical analysis of *DPP (Vic) v O'Neill*", J Walvisch and A Carroll, 41 MULR 417.

²⁰ *DPP v Bruno* [2018] VSC 822.

²¹ That is a personality disorder listed in Section II of DSM-5.

85 Secondly, your personality disorder has arisen out of your deprived background. In those circumstances, I have been mindful of the need to avoid inappropriate doubling up of the mitigatory effect of the *Bugmy* and *Verdins* principles in this particular case.

86 Thirdly, your personality disorder reduces, but does not remove, the need for general deterrence. Women should be free to walk the streets alone, without fear of being violently attacked by strangers. Your sentence must also reflect the court's denunciation of, and the need for just punishment for, these terrible crimes.

87 Dr Carroll does not believe that imprisonment will worsen your condition, or that you will experience custody as more onerous than somebody without a severe personality disorder. Indeed, your counsel informed the court that you were finding a safe place to sleep, three meals a day, a hot shower, and the prospect of being able to undertake courses, better than living on the streets; that is a rather bleak reflection of the circumstances in which you were previously living.

88 There are a number of other matters that are relevant to sentencing you.

89 You were charged on 19 January 2019. At the committal mention on 7 June 2019, you pleaded guilty to rape and murder, having indicated in the previous week that you were prepared to do so. The prosecution accepts that you pleaded guilty at the earliest possible opportunity.

90 You are entitled to a discount on the sentence to be imposed, in recognition of your plea, and its utilitarian value. Your plea has facilitated the course of justice. The community has, by your plea, been spared the time and cost of a trial. The family and friends of Ms Maasarwe have been spared what would have been a very traumatic trial.

91 However, any expressions of remorse have been recent and limited. You denied any involvement in these offences when interviewed by police in January 2019. You only offered to plead guilty four months later, in the face of an overwhelming prosecution case against you. It seems that you have limited insight, and do not yet accept the full

gravity of what you have done. According to both experts, that is not because of some psychopathic tendency; rather, it is part and parcel of your overall emotional detachment, which developed as a result of early trauma and neglect.

- 92 At the start of the third and final day of the plea hearing, you produced a hand-written letter of apology, addressed to Ms Maasarwe's family. Whether the letter provides them with any comfort is a matter for them. As far as the sentencing exercise is concerned, I give it limited weight, given how late it came, and in light of the expert evidence.
- 93 Your age is also a relevant consideration in sentencing you. You were 20 at the time of the offending; you are now 21.
- 94 The law says that the youth of an offender should be a primary consideration for a sentencing court, where the matter properly arises. In the case of such an offender, rehabilitation is usually more important than general deterrence; rehabilitation benefits the community as well as the offender. One of the important reasons underlying these principles is that young people may be more prone to acting in a spontaneous and ill-considered fashion, when their brains have not finished maturing.
- 95 However, those principles are not absolute; due regard must be had in each case to other relevant matters, including the seriousness of the offending, and whether there has been any prior offending. Generally speaking, the more serious the offending, the less the weight to be attached to youth. But the mitigatory effect of youth will be extinguished only in circumstances of the gravest criminal offending, and where there is no realistic prospect of rehabilitation.
- 96 The prosecution urged me to find that your prospects of rehabilitation were "guarded at best", such that the mitigatory effect of your youth had little, if any, role to play.
- 97 Dr Carroll noted a number of factors which led him to conclude that you have favourable prospects of rehabilitation. You are open and willing to engage in treatment, and are working well with your mental health team in custody. You have

no major cognitive deficits, or residual symptoms of enduring mental illness, which would impede rehabilitation. The maturation of your central nervous system over the next few years should assist with the development of improved emotional regulation, and other higher order cognitive and social skills. There are a number of remediable, relevant, dynamic risk needs that can usefully be addressed over the coming years. Finally, there is evidence that the angry type of sexual homicide offender, such as yourself, can eventually be rehabilitated, if provided with appropriate treatment, support and supervision.

98 Although Associate Professor Brewer was a little more circumspect than Dr Carroll regarding your prospects of rehabilitation, I accept that you do have fair prospects of rehabilitation if you are given appropriate treatment, support and supervision.

99 Somewhat remarkably, given the chaotic life you were living before the start of this year, you have no prior convictions.²² Your offending demonstrated the spontaneous, ill-considered features with which the young offender principles are concerned. Although the mitigatory effect of your youth is substantially reduced because of the seriousness of this offending, it still has some role to play in sentencing you.

100 The prosecution accept that you should be eligible for parole at some stage. It is in the community's interests, as well as yours, that you have an opportunity to participate in appropriate rehabilitation programs under the supervision of the Adult Parole Board. Whether or not you will be eligible for parole will depend on your behaviour in custody, and the extent to which you are assessed, at that time, to still present a risk to the community.

101 For the first few months after your arrest in January of this year, you were kept in isolation because of concerns about suicide risk. Since then, you have been held in protection units, in order to protect you from other prisoners. I accept that, due to the nature of this offending, and the publicity which this case has attracted, you are likely to remain in protection even after you are sentenced. However, a large proportion of

²² After this offending, you were dealt with for some minor property offences, which were proven and dismissed.

the Victorian prison population is held in protection at any given time, so it is necessary to consider the particular conditions in which you have been held. There is no evidence that your protection status has led to any serious restrictions on your employment, study or leisure options, or the amount of time spent out of your cell.

- 102 The maximum penalty for murder is life imprisonment. The maximum penalty for this type of rape is 25 years' imprisonment.²³
- 103 The rape and murder charges both come under the standard sentencing scheme, which applies to specific offences committed after 1 February 2018. The standard sentence for an offence is said to be the sentence that, taking into account only the objective factors affecting the relative seriousness of that offence, is the middle of the range of seriousness. The objective factors look only at the offending conduct, and exclude any matters personal to the offender.
- 104 A standard sentence is not the same thing as a mandatory sentence. Nor is a standard sentence the primary sentencing consideration, or the starting point from which to add or subtract time. It is just one of the many matters to be taken into account by a court in performing the instinctive synthesis method of sentencing.
- 105 The standard sentence for murder is 25 years. The standard sentence for this type of rape is 10 years.
- 106 One of the many matters to which a court is required to have regard in any sentencing exercise is current sentencing practices for that offence. Comparing the circumstances of different offending can seem insensitive to family members and the broader community; unfortunately, it is a necessary part of the sentencing process.
- 107 In the case of a standard sentence offence, the court may only have regard to sentences imposed for other standard sentence offences.²⁴ So far, there have only been a handful of murder cases that have fallen under the standard sentencing scheme.

²³ *Crimes Act 1958*, s 38(1).

²⁴ *Sentencing Act 1991*, s 5B(2)(b).

- 108 In urging the court to impose a life sentence, the prosecution sought to rely on the recent sentence imposed on Jaymes Todd, the man who raped and murdered Eurydice Dixon in Princes Park.²⁵
- 109 There are some similarities between the two cases, including the following: you both brutally raped and murdered a complete stranger, late at night, in a public place; you were both young offenders with no prior convictions; you both pleaded guilty at an early stage, but had limited remorse; and both cases fell within the standard sentence provisions.
- 110 However, there are also some very important points of difference between this case and the *Todd* case.
- 111 On the one hand, Mr Todd killed his victim with his bare hands, rather than a weapon. He also did not commit any aggravating act, such as setting fire to the body.
- 112 On the other hand, unlike in this case, Mr Todd's offending involved substantial premeditation. He had had a long-standing sexual fantasy to rape and strangle to death a woman, for more than a year. On the night in question, he spotted his intended victim and followed her on foot for almost an hour, through the city and Carlton streets, until he was able to attack her in a remote location. As his victim's suffering was at the core of his coercive sexual sadism disorder, Mr Todd restrained Ms Dixon throughout the attack and eventually choked her to death, as she bravely tried to fight back. The experts agreed that the paraphilic interest that underlay Mr Todd's disorder was untreatable, resulting in his prospects of rehabilitation being very limited. Mr Todd's background did not give rise to specific *Bugmy* considerations, nor was it suggested that *Verdins* principles applied to his sexual sadism disorder.
- 113 All of those different features mean that the *Todd* decision is only of limited assistance in sentencing you.

²⁵ *DPP v Todd* [2019] VSC 585.

- 114 Furthermore, the High Court has made it clear that current sentencing practices are not determinative; they are no more or less important than any of the other factors which the sentencing court is required to consider.²⁶
- 115 Every case is different and needs to be decided on its own facts, having regard to the particular circumstances of the offence and the offender. It is common for cases to involve a mixture of aggravating and mitigating factors, which pull the sentencing court in opposite directions; this case is no different in that regard.
- 116 There is no question that your offending falls well above the mid-range for each offence. But, terrible as this offending was, and devastating as it has been for the Maasarwe family, having regard to all the matters I have discussed, this case does not warrant the imposition of the maximum penalties.
- 117 On charge 1, rape, I sentence you to 12 years' imprisonment.
- 118 On charge 2, murder, I sentence you to 32 years' imprisonment. This will be the base sentence.
- 119 Although these offences were committed as part of the one relatively short episode, there should be some cumulation to reflect the fact that the rape involved additional criminality above and beyond the murder. I order that 4 years of the sentence on charge 1 be served cumulatively on the base sentence. That makes a total effective sentence of 36 years.
- 120 I fix a period of 30 years as the period you must serve before you become eligible for parole.²⁷
- 121 Had you not pleaded guilty, I would have sentenced you to imprisonment of 40 years, with a non-parole period of 35 years.

²⁶ *DPP v Dagleish* (2017) 262 CLR 428.

²⁷ Unless the court considers that it is in the interests of justice not to do so, the non-parole period for a standard sentence offence must be at least 70% of the relevant term, if that term is more than 20 years' imprisonment and less than life imprisonment: *Sentencing Act 1991* s 11A(4).

122 Further, I declare that the period to be reckoned as already served under this sentence is 283 days, not including today's date. I direct that there be noted in the records of the court the fact that such declaration was made and its details.

CERTIFICATE

I certify that this and the 22 preceding pages are a true copy of the sentencing remarks of Hollingworth J of the Supreme Court of Victoria delivered on 29 October 2019.

DATED this twenty ninth day of October 2019.


Associate
